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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 879

THE PENNSYLVANIA RAILROAD COMPANY and THE PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY,

Petitioners,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY, Guardian of the Estate of HENRY LEE EDWARDS, a minor,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Supreme Court of Illinois is fully and correctly set forth in Petition, Appendix A at p. 14a, and is reported at 35 Ill.2d 145; 219 N.E.2d 529

(1966). The Illinois Supreme Court filed two earlier opinions which are unreported. The first opinion is identical with the final opinion, and is fully and correctly set forth in Petition, Appendix A, pp. 1a-7a. The second opinion is unreported and is fully and correctly set forth in Petition, Appendix A, pp. 8a-13a.

The opinion of the Appellate Court of Illinois is fully and correctly set forth in Petition, Appendix A, pp. 21a-45a, and is reported at 52 Ill.App.2d 406, 202 N.E.2d 79 (1st Dist. 1964).

JURISDICTION.

There are no valid constitutional questions presented by the Petition, and Petitioners therefore improperly seek to invoke the jurisdiction of this Court under 28 U.S.C. §1257 (3). But even if constitutional questions were presented, which Respondent denies, the issues as to the deprivation of any of the Petitioners' constitutional rights were not raised at the first opportunity in the state courts of Illinois, and therefore are not preserved for review by this Court. See argument, infra, pp. 10-11.

QUESTIONS PRESENTED.

1. Whether Petitioners can invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257 (3), when the alleged constitutional questions stated in the Petition for the Writ of Certiorari were not raised until after the Illinois Supreme Court had rendered its opinion more than four years after the trial, in favor of Respondent and against Petitioners.

2. Whether the constitutional rights of the Petitioners to a jury trial or due process were violated because the Illinois Supreme Court affirmed a judgment against Petitioners on the basis of negligence of a co-defendant railroad operating its train on Petitioners' tracks, for which negligence Petitioners were liable under state law, where the only error complained of, the introduction of fencing ordinances and references by counsel thereto, could in no way have affected the jury verdict against the co-defendant, or the jury verdict against the Petitioners on the ground that Petitioners were liable for the negligence of their co-defendant.

STATEMENT OF THE CASE.

This was an action to recover damages for personal injuries suffered by the 13 year old minor plaintiff when he was run over by a Chicago, Milwaukee, St. Paul & Pacific Railroad Company train, which was operating under a leasing agreement on the tracks and right of way owned and controlled by the Pennsylvania Railroad Company, and the Philadelphia, Baltimore, and Washington Railroad Company. The plaintiff suffered a traumatic amputation of both his legs. Suit was brought against three railroads: The Pennsylvania Railroad Company, a corporation; The Philadelphia, Baltimore and Washington Railroad Company, a corporation (hereinafter jointly referred to as the "Pennsylvania"); and The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation (hereinafter referred to as the "Milwaukee"). The two railroads identified as the "Pennsylvania" owned and controlled the tracks and right of way. The "Milwaukee," under a leasing agreement, was one of several railroads which operated on the Pennsylvania tracks. (R. 3, pp. 104-105)

The jury rendered a general verdict for the plaintiff against all three defendants for $275,000.00, and the court entered judgment upon the verdict. After all Post-trial motions had been overruled, the Milwaukee paid the plaintiff the sum of $75,000.00 for a covenant not to enforce the judgment against it, and the Pennsylvania appealed.

The Only Ground Of Recovery Against The Milwaukee Submitted To The Jury.

The claim against the Milwaukee was submitted to the jury on the theory that the Milwaukee was negligent in the operation of its train, and that its negligence was a proximate contributing cause of the plaintiff's injuries which occurred while the plaintiff was in the exercise of ordinary care. The liability of the Milwaukee was based solely on its common law duty to exercise ordinary care in the operation of its train. The liability of the Milwaukee was not based on any duty under any ordinance or under the common law to fence or guard the right of way of Petitioners, the Pennsylvania, the owning railroads.

The jury was instructed that the Milwaukee had no duty to fence the right of way, and that the only charge of negligence against the Milwaukee was that it negligently operated its train. (R. 3, p. 45) Plaintiff's counsel told the jury that the liability of the Milwaukee was different from that of the Pennsylvania; that the obligation of the Milwaukee was *limited* to the manner in which the train was operated, and what warnings management should have given operating personnel about the running of trains at the place in question. (R. 3, pp. 387-388) The Illinois Supreme Court held, 35 Ill.2d at 152:

> "A fair reading of the record convinces us that the jury could not have been prejudiced by the stress placed on the ordinances in rendering judgment against the Milwaukee."

The jury found in favor of the plaintiff and against the Milwaukee. The Illinois Supreme Court noted, 35 Ill.2d at 152:

"There is sufficient evidence in the record from which the jury could find that the train crew on the Milwaukee was negligent and the Pennsylvania does not question this point."

The Grounds Of Recovery Alleged Against The Pennsylvania.

In the trial of the cause the plaintiff relied upon three separate and distinct bases of liability on the part of the Pennsylvania:

1. The Pennsylvania, as owner of the tracks and right of way on which the Milwaukee was operating its train at the time of the occurrence, was liable for the negligence of their lessee, the Milwaukee.

2. The Pennsylvania was liable because of their common law negligence in failing to take reasonable precautions to protect children from being injured on their property, after they knew, or in the exercise of ordinary care should have known, that for at least 25 years children ranging from ages 6 to 16 years had been going up on the railroad tracks to get to and from a playground immediately adjacent to the right of way, and playing on the elevation, and getting on and off standing cars or riding on slow moving trains in the area; that the children because of their immaturity were unable to appreciate the great danger to which they were exposed; and the Pennsylvania, because of the extreme danger to the children under the foregoing circumstances, should have foreseen that the children might have been injured, and should have taken reasonable precautions to protect the youngsters from injury on the premises of the railroads.

3. The Pennsylvania was liable for its failure to fulfill its contractual agreement to fence its right of way. The contract was entered into by the Pennsylvania's predecessor pursuant to a special ordinance of the City of Chicago.

The foregoing are the three grounds for recovery from Petitioners upon which the Respondent relied in the trial court.

The Holding of the Illinois Supreme Court.

The Illinois Supreme Court held that the liability of the Pennsylvania was conclusively established on the first basis of liability advanced by the plaintiff, that the Pennsylvania had not questioned the fault of the Milwaukee, as shown by the evidence; that since the Milwaukee was negligent in the operation of its train, the Pennsylvania, as owner of the tracks, was liable for the negligence of the Milwaukee. The court stated, 35 Ill.2d at 151-152:

> "It is well established that where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another company authorized or permitted to use the tracks, both railroad companies are jointly and severally liable for damages to the injured. (*Armstrong* v. *Chicago and Western Indiana Railroad Co.*, 350 Ill. 426; *Chicago and Eastern Railroad Co.* v. *Schmitz*, 211 Ill. 446; *Chicago and Grand Trunk Railway Co.* v. *Hart*, 209 Ill. 414.) It is not disputed that the Milwaukee was the lessee of the Pennsylvania."

Because the Pennsylvania, under long established Illinois law, was liable for the negligence of the Milwaukee, the Illinois Supreme Court deemed it unnecessary to discuss the negligence of the Pennsylvania based upon their

common law duty to protect children, stating, 35 Ill.2d at 153-154:

> "Since the liability of the Milwaukee was not based on the attractive nuisance doctrine and since the Pennsylvania is vicariously liable for the negligence of the Milwaukee, we see no reason to consider the applicability of the attractive nuisance doctrine as applied to the Pennsylvania."

Similarly, since the negligence of the Milwaukee, when the case was submitted to the jury, was not based on any alleged failure to comply with a common law duty to fence or any ordinance pertaining to fencing, and since the Pennsylvania is vicariously liable for the negligence of the Milwaukee, it was not necessary that the court, in upholding the Respondent's recovery against the Pennsylvania, consider the binding effect of the contractual agreement of the Pennsylvania to fence, pursuant to the track elevation ordinances of the City of Chicago. However, the court did pass on that question also. As noted by the Illinois Supreme Court in its opinion, 35 Ill.2d at 148, the Pennsylvania devoted over one-half of its brief to the question of the fencing ordinances, and an *amici curiae* brief was filed by nine major railroad companies urging the Illinois Supreme Court to hold the Chicago fencing ordinances invalid because of the passage of the Illinois Public Utilities Act.

Respondent contended that a holding that the *passage* of the Illinois Public Utilities Act creating a Commerce Commission relieved the railroads of their contractual obligations to the inhabitants of the City of Chicago to fence their rights of way would be violative of the contract clause of the federal and state Constitutions; U. S. Const. art. I, §10; Ill. Const. art. II, §14. Although, as

shown, a decision as to the validity of the fencing ordinances was not necessary to the determination of the liability of the Pennsylvania, the court did pass on that issue, held the ordinances invalid, and that the Pennsylvania was not obligated to fence by virtue of the requirements of any ordinance.

The court noted however that the introduction in evidence of these fencing ordinances in no way affected the liability of the Milwaukee Railroad, or the liability of the Pennsylvania for the negligence of the Milwaukee. The court concluded that the admission in evidence and references to the fencing ordinances were therefore harmless error, and the judgment for the Respondent against the Petitioners was accordingly affirmed.

ARGUMENT.

1. PETITIONERS DID NOT RAISE THEIR ALLEGED CONSTITUTIONAL QUESTION AT THE FIRST OPPORTUNITY IN THE STATE COURTS, AND THAT QUESTION HAS THEREFORE NOT BEEN PRESERVED FOR REVIEW BY THIS COURT.

The Petitioners did not raise the alleged constitutional question as to the deprivation of the right to a fair jury trial at the first opportunity. Petitioners admit that they did not raise the constitutional question until their Petition for Rehearing was filed in the Illinois Supreme Court (Pet'n., p. 2), four years after the judgment had been rendered in favor of the plaintiff.

Prior to the first opinion entered by the Illinois Supreme Court, the Petitioners never argued that the introduction of the ordinances resulted in a denial of a constitutional right to a fair jury trial, despite the fact that the Respondent had repeatedly and consistently argued, both before the Appellate and Supreme Courts, that even if the court were to hold that a recovery could not be sustained against the Pennsylvania on the basis of their alleged violation of the fencing ordinances, the Pennsylvania were nevertheless liable, independently of any other ground, because of the negligence of the Milwaukee Railroad while operating its train on the Pennsylvania tracks.

The trial court's judgment was entered in 1962. Not until 1966, after both the Appellate and Supreme Courts of Illinois had held the plaintiff was entitled to recover under Illinois law, did the Petitioners first attempt to

open an avenue of review to the United States Supreme Court by contending that there had been violation of a federally protected constitutional right of Petitioners to a fair jury trial.

2. THE CLAIM THAT CONSTITUTIONAL RIGHTS WERE VIOLATED IS WITHOUT MERIT.

The Pennsylvania were not deprived of due process of law or of the right to a trial by jury because of the introduction of evidence as to fencing and track elevation ordinances or any reference thereto during the trial.

The Milwaukee was one of a number of railroads operating its trains on the tracks of the Pennsylvania under a leasing agreement. The evidence proved that the Milwaukee negligently operated one of its trains, and thereby proximately caused the injuries suffered by the plaintiff. The trial judge, the Appellate Court of Illinois, and the Illinois Supreme Court all found that there was sufficient evidence in the record to uphold the finding of the jury that the Milwaukee train was negligently operated on the Pennsylvania tracks. Negligent operation of its train was the only charge against the Milwaukee which was submitted to the jury.

The Pennsylvania *has never questioned* the fact that there was sufficient evidence in the record from which the jury could properly find that the train crew on the Milwaukee was negligent.[1]

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[1] The first time in the long history of this case in which the Petitioners make any reference to the evidence against the Milwaukee is in a somewhat ambiguous reference in a footnote in their Petition for Certiorari, p. 8.

When the liability of the Milwaukee, a lessee or user of the Pennsylvania tracks was established, the Pennsylvania as the owner-lessor became vicariously liable. The Pennsylvania, as the owning-lessor railroads, were legally responsible for the acts of the Milwaukee, the lessee or user, in the operation of the Milwaukee train on the Pennsylvania tracks. *Chicago & E. I. RR.* v. *Schmitz,* 211 Ill. 446, 71 N.E. 1050 (1904); *Armstrong* v. *C. & W. I. RR.,* 350 Ill. 426, 183 N.E. 478 (1932); *Chicago and Erie RR.* v. *Meech,* 163 Ill. 305, 45 N.E. 290 (1896); *Pennsylvania Co.* v. *Ellett,* 132 Ill. 654, 24 N.E. 559 (1890).

In *Pennsylvania Co.,* supra, the court stated, 132 Ill. at 659, that under an "unbroken line of decisions":

> "[W]here injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable."

And, at p. 660:

> "It follows, therefore, that no other negligence than that of the company or corporation permitted or authorized by the owner company to use its railway, need be alleged or proved to fix the liability of the owner."

The evidence and verdict establishing the liability of the Milwaukee established also the liability of the Pennsylvania.

The Illinois Supreme Court in the instant case further held that the introduction of the fencing ordinances were not prejudicial on the issue of whether the Milwaukee negligently operated its train, stating, 35 Ill. 2d at 152:

> "The court instructed the jury that the Milwaukee 'had no duty to erect and maintain a fence on the premises in question, nor to maintain the walls of said elevation nor to maintain the premises in question.' Plaintiff's counsel in his opening and closing statements to the jury said the ordinances applied only to the Pennsylvania and that the Milwaukee had no duty to fence the right of way. A fair reading of the record convinces us that the jury could not have been prejudiced by the stress placed on the ordinances in rendering judgment against the Milwaukee."

The Milwaukee never claimed that it was prejudiced by the introduction of the fencing ordinances, and the Pennsylvania never made that claim.

It is certain that in rendering the general verdict against the Milwaukee and Pennsylvania, the jury found that the Milwaukee was negligent in the operation of its train, since this was the only charge against the Milwaukee submitted to the jury. The liability of the Pennsylvania can be predicated solely on the negligence of the Milwaukee.

The Pennsylvania had a full and fair opportunity during the trial and on appeal to defend against this claim of negligence on the part of the Milwaukee, but as the Illinois Supreme Court noted, the Pennsylvania never questioned the sufficiency of that evidence; 35 Ill.2d at 152.

CONCLUSION.

The Illinois Supreme Court, although regarding the introduction of, and references by counsel to the ordinances as erroneous, nevertheless, correctly treated any such error as harmless because there was a separate and dis-

tinct ground for recovery, i.e. the vicarious liability of the Pennsylvania for the negligent acts of the Milwaukee, which the court held was sustained by the evidence and could not have been affected by the alleged error.

The Illinois Supreme Court, in so holding, adhered to and applied a principle followed in courts of review throughout the land, that a case will not be reversed for harmless error.

The opinion of the Illinois Supreme Court therefore did not deny Petitioners any of their constitutional rights. Petitioners make no showing of any departure from the accepted and usual course of judicial proceedings that calls for an exercise of this Court's powers of supervision, such as is contemplated by U. S. Supreme Court Rule 19.

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.